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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

ENRIQUE ANGEL RAMOS,
Appellant
v.
THE STATE OF TEXAS,
Appellee

Appeal from Thirteenth Court of Appeals
Cause No. 13-17-00429-CR
Trial Court Cause No. CR-0183-16-E
Hidalgo County, Texas

APPELLANT'S REPLY BRIEF ON THE MERITS

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IDENTITY OF PARTIES AND COUNSEL

Appellant is Enrique Angel Ramos. He is represented on appeal to this Court by Victoria Guerra. Her address is 3219 N. McColl Rd., McAllen, TX 78501. Lucia Regalado is of counsel and has assisted in the drafting of this reply brief on the merits, as she is attempting to qualify to be on the Hidalgo County appellate wheel. Her address is: Appellant was represented at trial by Hon. Allegra Hill, 820 E. Hackberry Ave., McAllen, Texas 78501 in the Appellate Court.

Appellee is the State of Texas, by and through her District Attorney for Hidalgo County, the Hon. Ricardo Rodriguez, Jr., Appellee is represented on appeal by Hidalgo County Assistant District Attorney Michael W. Morris. Appellee was represented at trial by Hidalgo County Assistant District Attorney Hope Palacios. Their address is: Hidalgo County Courthouse Annex III, 100 E. Cano St., Edinburg, Texas 78539.

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NO. PD-0788-20

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

ENRIQUE ANGEL RAMOS,
Appellant
v.
THE STATE OF TEXAS,
Appellee

APPELLANT'S REPLY BRIEF ON THE MERITS

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

A person who is convicted and sentenced under Texas Penal Code § 21.02, Continuous Sexual Abuse of a Child, should not be subject to additional punishment under Texas Penal Code §25.02, Prohibited Sexual Conduct, where the act relied upon for conviction of the latter is subsumed by the first resulting in a violation of constitutional proportions. The State's opinion that Appellant "deserves to be punished for both his pattern of abuse and incest" does not play into the legal analysis set forth below. State's Brief on the Merits, pg. 1.

STATEMENT OF THE CASE

A jury found Appellant guilty of prohibited sexual conduct and continuous sexual abuse. C7–8. He was sentenced him to five years' confinement for prohibited sexual conduct, and forty years' confinement for continuous sexual abuse of a child. Supp.C29, 34; 12R33–34. On July 5, 2017, the Honorable Judge Rose Guerra Reyna, presiding judge of the 206th District Court in Hidalgo County, Texas, entered judgments of conviction against Appellant. C265–70.

Appellant appealed the judgments. C287. The Thirteenth Court of Appeals rendered its decision on July 23, 2020, affirming Appellant's Ramos' judgment of conviction for continuous sexual abuse of a child but modified the judgment to vacate the prohibited sexual conduct conviction, and affirming the Trial Court judgments as modified.

The State filed its petition for discretionary review.

STATEMENT REGARDING ORAL ARGUMENT

The Appellant requests oral argument.

RESPONSIVE ISSUE PRESENTED

The Legislature did not intend punishments for both continuous sexual abuse, TEX. PENAL CODE § 21.02, and prohibited sexual conduct, TEX. PENAL CODE § 25.02, against the same child.

STATEMENT OF FACTS

Appellant adopts paragraph one of Appellee's Statement of Facts. Appellant adds the following facts:

On November 29th, 2016, a three-count indictment was filed against the Appellant which reads in pertinent part:

> ….Defendant….did then and there, during a period that was 30 or more days in duration, to wit: from on or about 11th day of August, 2011, through on or about the 11th day of August, 2016, when the defendant was 17 years of age or older, commit two or more acts of sexual abuse against Alicia Gonzalez, a pseudonym, a child younger than 14 years of age, namely, aggravated sexual assault of a child, by intentionally or knowingly causing the sexual organ of Alicia Gonzalez to contact the sexual organ of the defendant, aggravated sexual assault of a child by intentionally or knowingly causing the penetration of the sexual organ of Alicia Gonzalez by the defendant's sexual organ, indecency with a child, by, with the intent to arouse or gratify the sexual desire of the defendant, engaging in sexual contact with Alicia Gonzalez, by touching any part of the genitals of Alicia Gonzalez;
>
> COUNT TWO
>
> ….Defendant, on or about the 11th day of August, 2016….did then and there intentionally or knowingly engage in sexual intercourse with Alicia Gonzalez, a pseudonym, a person the defendant knew to be, without regard to legitimacy, the defendant's stepchild;

COUNT THREE

> ….Defendant, on or about the 11th day of August, 2016….did then and there, intentionally or knowingly cause the penetration of the sexual organ of Alicia Gonzalez, a pseudonym, by the defendant's sexual organ;

C7–8.

During the trial, evidence showed that Alicia told her mother, (C.E.), that Appellant had forced her to have sexual intercourse in the bathroom of his workplace. 9R42–43, 66–67. C.E. moved out of the home she shared with Appellant, and then contacted the police and took Alicia to the hospital for a sexual assault examination. 9R43–44, 67–68, 95–120.

Appellant agreed to go to the station with Detective Moreno and Sgt. Sandra Tapia to speak about the allegations made by Alicia. 7R9–13; 9R128–29. Appellant ultimately made certain admissions in his interrogation. 14STA4.46.63, 72 –77, 80–85, 86–90, 94–95, 106. 7R19–20, 32; 9R136–37.

A jury found Appellant guilty of prohibited sexual conduct and continuous sexual abuse, (C7–8), and was sentenced to forty years' confinement for continuous sexual abuse of a child, (count one), and five years' confinement for prohibited sexual conduct (count two). Supp.C29, 34; 12R33–34. On July 5, 2017, the Honorable Judge Rose Guerra Reyna, presiding judge of the 206th District Court in

Hidalgo County, Texas, entered judgments of conviction against Appellant. C265–70.[1]

SUMMARY OF THE ARGUMENT

The Court of Appeals did not err in finding a multiple punishments Double Jeopardy violation under the facts of this case. The State's position to the contrary is inconsistent with the cognate-pleadings approach, and it's main position (that double punishments are permitted by virtue of the different gravamen of Continuous Sexual Abuse of Child and Prohibited Sexual Conduct) is undermined by the legislative history.

[1] The State dismissed Count 3 in court on June 27, 2017. 9R7. The judgment of dismissal was entered July 5, 2017. C271

ARGUMENT

RESPONSIVE ISSUE 1: The Legislature did not intend punishments for both continuous sexual abuse, TEX. PENAL CODE § 21.02, and prohibited sexual conduct, TEX. PENAL CODE § 25.02, against the same child.

Introduction: Appellant submits that the prohibition against double jeopardy was violated when he was sentenced to multiple punishments for the same criminal act twice under two distinct statutes when the legislature intended the conduct to be punished only once. *See Price v. State*, 434 S.W.3d 601, 607–11 (Tex. Crim. App. 2014) (internal citations omitted). In other words, Appellant was punished twice—under Sections 21.02 and 25.02, TEX. PENAL CODE, for the same alleged act that the legislature intended to be punished once. C265–70. The judgments of conviction thus violate Appellant's freedom from double jeopardy under the Texas and United States Constitutions. U.S. CONST. amend. V; TEX. CONST. art. 1, § 14; *see also Weber v. State*, 536 S.W.3d 31, 35–37 (Tex. App.—Austin 2017, pet. filed) (holding that defendant's double jeopardy rights were violated where he was convicted and punished under Sections 21.02, Section 21.11, and 22.021 for the same conduct).

The Court of Appeals correctly held that double jeopardy protections is a fundamental protection and can therefore be raised for the first time on appeal, and that Appellant met the two prongs of *Garfias v. State*, 424 S.W.3d 54, 57–58 (Tex. Crim. App. 2014), cert. denied, 135 S. Ct. 359 (2014).

I. The Court of Appeals Properly Applied its Double-Jeopardy Analysis Under State Law

A. Double Jeopardy Analysis

"There are three distinct types of double jeopardy claims: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense." *Langs v. State*, 183 S.W.3d 680, 685 (Tex. Crim. App. 2006). This case only involves the third kind of claim—a multiple punishments claim.

A multiple punishments claim can arise in two contexts: "(1) the lesser-included offense context, in which the same conduct is punished twice; once for the basic conduct, and a second time for that same conduct plus more" and "(2) punishing the same criminal act twice under two distinct statutes when the legislature intended the conduct to be punished only once . . . ." *Id*. Both parties agree that only the second kind of multiple punishments claim is at issue in the instant case.

A constant theme when evaluating a multiple punishments claim is legislative intent. *See Ex parte Benson*, 459 S.W.3d 67, 71 (Tex. Crim. App. 2015) ("In the multiple-punishment context, the double-jeopardy clause prevents a court from prescribing greater punishment than the legislature intended."). Where, as here, two distinct statutory provisions are involved, "the offenses must be considered the same under both an 'elements' analysis and a 'units' analysis for a double-jeopardy violation to occur." *Id.*

B. Elements Analysis

When two statutory provisions are involved, the elements analysis begins with the *Blockburger* sameness test, which asks "whether each provision requires proof of a fact which the other does not." *Id*. at 72 (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). Both parties agree that the statutes at issue in the instant case are not the same under the *Blockburger* sameness test. However, this is not the end of the elements analysis:

> [I]n Texas, when resolving whether two crimes are the same for double-jeopardy purposes, we focus on the elements alleged in the charging instrument. Under the cognate-pleadings approach adopted by this Court, double-jeopardy challenges should be made even to offenses that have differing elements under *Blockburger,* if the same "facts required" are alleged in the indictment.

Bigon v. State, 252 S.W.3d 360, 370 (Tex. Crim. App. 2008) (citations omitted).

Thus, "[t]he inquiry [turns to] whether the Legislature intended to permit multiple punishments." *Ervin v. State*, 991 S.W.2d 804, 814 (Tex. Crim. App. 1999). The Court of Criminal Appeals has set forth a non-exclusive list of factors to consider in determining whether the legislature intended only one punishment for offenses that contain different elements under the *Blockburger sameness test (hereinafter "Ervin factors"):*

> (1) whether offenses are in the same statutory section or chapter; (2) whether the offenses are phrased in the alternative; (3) whether the offenses are named similarly; (4) whether the offenses have common punishment ranges; (5) whether the offenses have a common focus or gravamen; (6) whether the common focus tends to indicate a single

> instance of conduct; (7) whether the elements that differ between the two offenses can be considered the same under an imputed theory of liability that would result in the offenses being considered the same under *Blockburger* (a liberalized *Blockburger* standard); and (8) whether there is legislative history containing an articulation of an intent to treat the offenses as the same or different for double-jeopardy purposes.

Ex parte Benson, 459 S.W.3d at 72–73.[2]

C. Units Analysis

Even where two separate statutory provisions are the same under the elements analysis, "the protection against double jeopardy is not violated if the offenses constitute separate allowable units of prosecution." *Ex parte Benson*, 459 S.W.3d at 73. The units analysis asks: "(1) what the allowable unit of prosecution is, and (2) how many units have been shown. The first part of the analysis is purely a question of statutory construction and generally requires ascertaining the focus or gravamen of the offense. The second part requires an examination of the trial record, which can include the evidence presented at trial." *Ex parte Benson*, 459 S.W.3d at 73–74 (citations omitted).

[2] For purposes of clarity, the term "elements analysis" will refer to the use of *Blockburger* modified by the *Ervin* factors. The term "Blockburger sameness test" will refer strictly to the *Blockburger* same-elements test.

D. In the Instant Case, the Outcome of the Units Analysis Depends on the Outcome of the Elements Analysis

Nowhere in its brief does the State engage in an independent units analysis.[3] However, the State does consistently refer to the unit of prosecution for both CSA and PSC in the context of the elements analysis. For example, the State faults the appellate court for holding that the "'focus and unit of prosecution' of PSC as charged in penetration." (State's Brief, at 11). According to the State, the appellate court "disregarded the very thing that defines PSC and sets it apart—the relationship between the actor and other person." *Id*. This purported reference to the focus of the PCS statute hardly answers the question of what exactly the unit of prosecution is for PSC for a units analysis. And although the gravamen of an offense is important, under the units analysis, it is merely a way of ascertaining the unit of prosecution of an offense, which is the ultimate consideration under such analysis.

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[3] The State spends much of its brief discussing the Gravamens of the two statutory provisions at issue in the instant case. It is important to note that the Gravamen of an offense enters into both the elements and units analyses of a Double Jeopardy Claim. As the Court recently explained:

> [i]n some later cases we have given more weight to the fifth and sixth [*Ervin*] factors, which, in combination, require that we examine the focus or gravamen of each offense and compare the resulting allowable units of prosecution. Although determining the allowable unit of prosecution is part of a separate "units" analysis (conducted when only a single statute is involved or after offenses proscribed by two statutes are deemed the same under an "elements" analysis), consideration of the unit of prosecution can play a role even in an "elements" analysis by helping to ascertain the legislative intent.

Ex parte Benson, 459 S.W.3d at 73.

Loving v. State, 401 S.W.3d 642, 647 (Tex. Crim. App. 2013) ("Absent an express statement defining the allowable unit of prosecution, the gravamen of an offense best describes the allowable unit of prosecution.").

The State does not attempt to argue that CSA and PSC have different units of prosecution. Nor should it, as the elements analysis is outcome-determinative to the units analysis. As the Thirteenth Court of Appeals recently held, "the unit of prosecution for continuous sexual abuse is a series of acts of sexual abuse 'that occur over an extended period of time against a single complainant.'" *Cisneros v. State*, No. 13-18-00652-CR, 2021 WL 822302, at *6 (Tex. App. Mar. 4, 2021) (finding that a defendant may be convicted of two counts of CSA against two different victims even though the predicate conduct occurred over the same period of time). The unit of prosecution of a given predicate offense is each completed act. *See, e.g., Vick v. State*, 991 S.W.2d 830, 833 (Tex. Crim. App. 1999) (holding that multiple prosecutions for aggravated sexual assault based on different statutory subsections are permissible because the Legislature defined the "allowable unit of prosecution" as each completed act).

As pleaded, the State refers to the following as one of the completed acts that would satisfy the CSA statute: "aggravated sexual assault of a child by intentionally or knowingly causing the penetration of the sexual organ of Alicia Gonzalez, by Defendant's sexual organ." The reason the appellate court focused on the act of

penetration is because it is important in this context. Under the PSC statute, penetration ("sexual intercourse" under the statute) is a separate and distinct unit of prosecution from the alternative charge of "deviate sexual intercourse." *See Badillo v. State*, 255 S.W.3d 125, 128–29 (Tex. App. 2008) (noting that the State can indict a defendant for both PSC-deviate sexual intercourse and PSC-sexual intercourse, but it must choose to submit only one alternative means to the jury).

Thus, the State could have easily avoided the instant dilemma before the Court by pleading the case differently. For example, if an act of penetration were omitted as a predicate offense candidate in Count 1 ("aggravated sexual assault of a child by intentionally or knowingly causing the penetration of the sexual organ of Alicia Gonzalez, by Defendant's sexual organ") then there is no question that Defendant could be convicted of both CSA and PSC-Sexual Intercourse. This was the reason the appellate court properly focused on the unit of prosecution for the instant PSC count as penetration. The State chose to plead otherwise.

Under the units analysis then, the issue is whether PSC, as pleaded, qualifies as one of those acts of sexual abuse that is part of a series of acts of sexual abuse that occur over an extended period of time against a single complainant.[4] However, in

[4] A units analysis is superfluous when comparing CSA with an enumerated predicate offense because the unit of prosecution of a predicate offense is merely one of those very acts that constitute the series of acts of sexual abuse that form the unit of prosecution for CSA, with the completed conduct of the predicate offense standing in a whole-part relation to the series of completed acts of conduct that is the unit of prosecution of the CSA offense.

this context, this merely gives way to the elements analysis. If double punishments are permissible here under the elements analysis, then PSC is simply outside of the series of acts of sexual abuse which form the unit of prosecution of CSA, and thus the units analysis permits double punishments as well. If on the other hand, double punishments are prohibited under the elements analysis, then PSC properly serves as one of the series of acts of sexual abuse which form the unit of prosecution of CSA (standing in a part-whole relation), and the units analysis prohibits double punishments as well.

E. A Note on Presumption

As noted above, both parties agree that the statutory sections at issue here fail the *Blockburger* sameness test. The State argues that when two statutes fail the *Blockburger* sameness test, it "raises a presumption of legislative intent to permit multiple punishments that can be rebutted only by clear evidence to the contrary." (Brief on the Merits, at 7). The State elsewhere describes this presumption as "strong." (*Id*., at 5). Respondent notes that use of the terms "clear evidence" and "strong presumption" are rhetorical in nature and have no basis in law.

The presumption created by the outcome of the *Blockburger* sameness test is merely statutory and is non-evidentiary. *See Ervin*, 991 S.W.2d at 807 (noting that the *Blockburger* sameness test is a "mere rule of statutory construction"). Thus, "if the two offenses have different elements under the *Blockburger* test, the

judicial presumption is that the offenses are different for double-jeopardy purposes and that cumulative punishment may be imposed. This presumption can be rebutted by a showing, through various factors, that the legislature 'clearly intended only one' punishment." *Ex parte Benson*, 459 S.W.3d at 72.

Despite the State's rhetorical flourish, the "clear evidence to the contrary" needed to rebut the presumption really is just a consideration of the *Ervin* factors. This is how courts routinely deal with the judicial presumption that arises where two statutes fail the *Blockburger* sameness test. *Ex parte Benson*, 459 S.W.3d 67, 72 (Tex. Crim. App. 2015) ("In *Ex parte Ervin,* we set forth a non-exclusive list of factors to consider in determining whether the legislature intended only one punishment for offenses that contain different elements under *Blockburger . . . .").* There is no other "clear evidence to the contrary" over and beyond the Ervin factors needed to rebut any so-called "strong presumption."

F. The Appellate Court's Decision

The Court of Appeals below properly recognized that this case involves a multiple punishments Double Jeopardy claim, and also that CSA and PSC fail the Blockburger sameness test. Thus, it turned to an analysis of the *Ervin* factors. *Ex parte Benson*, 459 S.W.3d 67, 72 (Tex. Crim. App. 2015) ("In *Ex parte Ervin,* we set forth a non-exclusive list of factors to consider in determining whether the

legislature intended only one punishment for offenses that contain different elements under *Blockburger* . . . .").

After reviewing the *Ervin* factors, the Court of Appeals concluded that:

> The offenses, as charged, share the same complainant (Alicia), focus and unit of prosecution (penetration), mode of commission (penile to vaginal), and period of time (August 11, 2016). Moreover, what would principally distinguish the statutes here—consent—is irrelevant as charged. Compare TEX. PENAL CODE ANN. § 21.02 (criminalizing repeated sexual acts against a child under the age of fourteen, which inherently precludes consent) with id. at § 25.02 (criminalizing intercourse between two familial persons, including two consensual adults). When the two charges stem from the impermissible overlap of the same underlying instances of sexual conduct against the same victim during the same time period, the record shows a double jeopardy violation.

(Opinion, at 21-23).[5]

The State itself acknowledges that some of the *Ervin* factors "offer marginal support for rebutting the presumption" in favor of double punishments. (Brief on the Merits, at 7). However, it does not otherwise extensively attempt to negate the

[5] The State argues that the Court of Appeals erred in using a "transitive approach" when determining whether dual convictions were permissible. (Brief on the Merits, at 4). In particular, the State faults the Court for comparing the elements of PSC and aggravated sexual assault, an enumerated predicate offense. However, this very approach is permitted by the cognate-pleadings approach employed by Texas courts. *Garfias v. State*, 424 S.W.3d 54, 58–59 (Tex. Crim. App. 2014) ("Under this so-called cognate-pleadings approach, double-jeopardy challenges can be made even against offenses that have different statutory elements, if the same facts required to convict are alleged in the indictment."). Given the fact-bound nature of the cognate-pleadings approach, it was permissible for the Court to determine whether, under the facts as pleaded, the PCS charge "mirror[ed]" a charge for aggravated sexual assault of a child. In short, the Court asked: are the facts here the same to convict for aggravated sexual assault, and if so, would the Legislature have wanted to permit double punishments in this context?

findings regarding the other *Ervin* factors. Rather, the State merely argues that "[w]hatever these factors are worth, however, two things prevent any indication of contrary intent sufficient to rebut the presumption of multiple punishments: their gravamina and CSA's comprehensive treatment of predicate offenses. (Brief on the Merits, at 8).

Accordingly, Respondent will address the only arguments the State puts forward to undermine the reasoning of the Court of Appeals as it pertains to the *Ervin* factors.

G. The CSA's Comprehensive Treatment of Predicate Offenses is Not Dispositive

The State makes much of the legislature's decision not to include PSC as an enumerated offense.[6] The State in *Price v. State* similarly argued "that because an attempt to commit a predicate offense is not included in the acts of sexual abuse enumerated in the statute, the Legislature intended to permit dual convictions for continuous sexual abuse and for an attempt to commit a predicate offense under the

[6] The State argues that "the fact that the Legislature did not include PSC within this comprehensive scheme says *something* about its intent. (Brief on the Merits, at 6) (emphasis in original). Of course, this fact does say something about legislative intent. However, the Court of Appeals did properly consider this intent in its analysis, since application of the *Blockburger cum Ervin* test itself acknowledges this intent by virtue of the presumption for failing the *Blockburger* sameness test. *Ex parte Benson*, 459 S.W.3d at 72 ("[I]f the two offenses have different elements under the *Blockburger* test, the judicial presumption is that the offenses are different for double-jeopardy purposes and that cumulative punishment may be imposed."). After all, under the sameness test, an enumerated predicate offense is a constitute element of the CSA statute, standing in a part-whole relation.

statute." *Price v. State*, 434 S.W.3d 601, 605 (Tex. Crim. App. 2014) (extensively discussing the legislative history behind the CSA statute in its analysis).

The *Price* Court, however, disagreed with the State. *Price*, 434 S.W.3d at 611 (holding that "the Legislature did not intend to permit dual convictions under these circumstances and that appellant's criminal-attempt conviction was, therefore, statutorily prohibited."). Thus, whether or not a given offense is listed an enumerated predicate offense is *not conclusive* to the Double Jeopardy analysis. At most, we are left with the same ambiguity that the *Price* Court acknowledged before proceeding to analyze the consideration of extra-textual factors. *Price*, 434 S.W.3d at 605 ("After reviewing the statutory language, we decide that it is ambiguous as to whether it permits dual convictions for the offenses of continuous sexual abuse and attempted aggravated sexual assault. We then consider the extra-textual factors before ultimately deciding that permitting dual convictions under these circumstances would violate the statutory scheme set forth by the Legislature.").

H. The State's Argument Regarding the Gravamens of CSA and PSC is Wrongheaded: The Legislature Was Aware that Prohibiting Dual Convictions by Virtue of the CSA Statute Would Sweep in Crimes Involving Sex Between Family Members

The State suggests that if the Legislature had wanted to include PSC as an enumerated predicate offense, it could have. (State's Brief, at 15). Although not stated explicitly, the State suggests that the absence of PSC as an enumerated offense is a result of the need to vindicate the separate gravamen of the PCS statute: sex

between family members. (*Id*., at 10). If this is the State's position, it proves too much. For example, merely looking at the inclusion of ASA as an enumerated offense shows that the legislature was aware that the new CSA statute would inevitably sweep in conduct where there is sex between family members. Prosecutions and convictions for ASA where there is a child victim who is related to the defendant were common *before* the Legislature passed the CSA statute.

For example, in *Diaz v. State*, decided years before the Legislature passed the CSA statute, the defendant was indicted and convicted of aggravated sexual assault of a child, and the victim was his daughter. *Diaz v. State*, 125 S.W.3d 739, 741 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd); *see Palmer v. State*, No. 2-02-040-CR, 2003 WL 1948697 (Tex. App. Apr. 24, 2003) (defendant convicted of aggravated sexual assault of a child where the victim was his daughter); *Wilson v. State*, No. 12-02-00042-CR, 2003 WL 21771766, at *1 (Tex. App. July 31, 2003) (same); *Rogers v. State*, No. 05-01-01173-CR, 2002 WL 31237938 (Tex. App. Oct. 7, 2002); *Markham v. State*, No. 05-02-00465-CR, 2003 WL 1787631, at *1 (Tex. App. Apr. 4, 2003) (same); *Balderas v. State*, No. 01-00-00639-CR, 2002 WL 123302, at *1 (Tex. App. Jan. 31, 2002) (same); *Alvarez v. State*, 63 S.W.3d 578 (Tex. App. 2001) (same).

Courts "presume the legislature was aware of all caselaw affecting or relating to the statute." *Brown v. State*, 915 S.W.2d 533, 536 (Tex. App. 1995), *aff'd*, 943

S.W.2d 35 (Tex. Crim. App. 1997). Thus, this Court must presume that the legislature was aware that merely by including ASA as a predicate offense, the CSA statute would in fact prevent double punishments for CSA and ASA where there is sex between family members (with ASA requiring a child victim under the age of 14). Furthermore, at a more abstract level, the legislature is presumed to be aware that successful Double Jeopardy claims would reach such facts despite any particular familial relationship not being an element of a predicate offense, by virtue of application of the cognate-pleadings approach used by Texas courts. *See Bigon v. State*, 252 S.W.3d 360, 370 (Tex. Crim. App. 2008) (Under the cognate-pleadings approach adopted by this Court, double-jeopardy challenges should be made even to offenses that have differing elements under *Blockburger,* if the same 'facts required' are alleged in the indictment.").

These conclusions cut against the State's argument that this Court needs to permit double punishments to vindicate the gravamen of the PSC statute: sex between family members.

Especially instructive here is *Price* itself, which set out the legislative history of the CSA statute. The *Price* Court, quoting Judge Cochran's concurrence in *Dixon v. State*, 201 S.W.3d 731, 737 (Tex. Crim. App. 2006), noted that prior to the enactment of the CSA statute, the common occurrence in child sex cases was as follows:

> [A] young child is repeatedly molested by an authority figure—usually a *step-parent, grandparent, uncle*[7] or caregiver; there is (or is not) medical evidence of sexual contact; and the child is too young to be able to differentiate one instance of sexual exposure, contact, or penetration from another or have an understanding of arithmetic sufficient to accurately indicate the number of offenses. As in this case, "he did it 100 times." The real gravamen of this criminal behavior is the existence of a sexually abusive relationship with a young child ... marked by continuous and numerous acts of sexual abuse of the same or different varieties.

Price, 434 S.W.3d at 607–08 (emphasis added).

For all the above reasons, it is clear that the legislature *never* intended to exclude acts of sexual abuse of a child where there is sex between family members from the sweep of the CSA statute. At most, the State has proved only the following: the legislature did not include PSC as an enumerated predicate offense. This would be conclusive if *Blockburge*r were the only test pertinent to the Double Jeopardy analysis. However, it is not. *See, e.g., Bigon*, 252 S.W.3d at 370 ("The two offenses are not the same under a strict application of the *Blockburger* test, but the *Blockburger* test is a rule of statutory construction and is not the exclusive test for determining if two offenses are the same.").

[7] Each of these would have fallen under the PSC statute.

PRAYER FOR RELIEF

WHEREFORE, the Appellant prays that the Court of Criminal Appeals deny Appellee's Petition for Discretionary Review and affirm the decision of the Appellate Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the Microsoft Word word-count tool, this document contains 4,812 words.

/s/ Victoria Guerra
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 7th day of April, 2021, the Appellant's Reply Brief has been e-filed and electronically served on the following:

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